STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

vs MSC No. 123641

DELEON D. TATE,
Defendant-Appellant,
/

Lower Court No. 99-12470
COA No. 237039

123641

BRIEF IN OPPOSITION
TO APPLICATION FOR LEAVE TO APPEAL

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COUNTERSTATEMENT OF QUESTIONS

I. **A defendant's voluntary statement to police is admissible in evidence, so long as the police observe the defendant's constitutional rights. Here, while Defendant denied making the statement in the first place, the interrogating officer testified that Defendant made a voluntary statement, after being apprised of his Miranda-rights. Was the trial court's decision to admit the statement clearly erroneous?**

Trial court said:	*No.*
Court of Appeals said:	*No.*
Defendant says:	*Yes.*
People say:	*No.*

II. **A defendant is entitled to representation by competent counsel. Here, while Defendant denied making a statement of any kind in the first place, the police testified that it was voluntary, and there was no evidence to the contrary. Was counsel ineffective for not trying to insist that the trial court rule on the voluntariness of a statement Defendant claims he never made?**

Defendant did not present this question to the trial court.

Court of Appeals said:	*No.*
Defendant says:	*Yes.*
People say:	*No.*

III. **Evidence is sufficient if it allows a rational factfinder to find all elements of the crime proven beyond a reasonable doubt. Here, testimony — including Defendant's confession — showed that the victim was shot to death during the course of an armed robbery. Taken in the light most favorable to the prosecution, was the evidence sufficient to sustain Defendant's conviction for felony murder?**

Trial court said:	*Yes.*
Court of Appeals said:	*Yes.*
Defendant says:	*No.*
People say:	*Yes.*

IV. **A prosecutor is free to argue all reasonable inferences from the evidence, including implying that a defendant is not nice for committing crimes like robbery and murder. In this case, Defendant offered no objection to the prosecutor's argument, which was based upon the evidence. Did the prosecutor's argument result in a manifest injustice**?

Defendant did not present this question to the trial court.

Court of Appeals said:	*No.*
Defendant says:	*Yes.*
People say:	*No.*

COUNTERSTATEMENT OF FACTS

The People accept Defendant's statement of facts; additional facts are cited in the text.

ARGUMENT

I.

A DEFENDANT'S VOLUNTARY STATEMENT TO POLICE IS ADMISSIBLE IN EVIDENCE, SO LONG AS THE POLICE OBSERVE THE DEFENDANT'S CONSTITUTIONAL RIGHTS. HERE, WHILE DEFENDANT DENIED MAKING THE STATEMENT IN THE FIRST PLACE, THE INTERROGATING OFFICER TESTIFIED THAT DEFENDANT MADE A VOLUNTARY STATEMENT, AFTER BEING APPRISED OF HIS *MIRANDA*-RIGHTS. THE TRIAL COURT'S DECISION TO ADMIT THE STATEMENT WAS NOT CLEARLY ERRONEOUS.

Standard of Review

Defendant's first claim involves related claims that the trial court erred in admitting into evidence his statement to police. In considering the question, this Court reviews the trial court's factual findings to see if they are clearly erroneous,[1] and its conclusions of law *de novo*.[2]

Discussion

In order to dispel what it called the "inherently compelling pressures" that arise in the context of custodial interrogation, in *Miranda v Arizona*[3] the United States Supreme Court decreed into law a system of safeguards which, it presumed, would serve to dispel the pressure, and permit a suspect to exercise his constitutional rights intelligently. Accordingly, it crafted the now-famous litany of *Miranda*-warnings, which police now incant before each interrogation, cautioning those under arrest

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[1]MCR 2.613(C).

[2]*See, eg, People v Sexton (After Remand),* 461 Mich 746 (2000); *People v DeLisle*, 183 Mich App 713 (1990).

[3]*Miranda v Arizonia,* 384 US 436, 86 S Ct 1602; 16 L Ed 2d 694 (1966).

that they have the right to counsel and the right not to speak — and that anything they say may come back to haunt them later, in court.[4] Moreover, when a suspect exercises any of the *Miranda*-rights, then the police must cease questioning — either until the suspect reinitiates the contact, if he asserts his *Miranda*-right to counsel,[5] or for a "decent interval" to allow the accused the chance to rest and reassess his intentions, if he has asserted his *Miranda*-right not to speak.[6] In the former case, the suspect may reinitiate contact merely by asking a police officer what is going to happen;[7] in the latter case, all the police need do is "scrupulously honor" his request to cease the interrogation, and they may seek to question him again, at a later time.[8]

Unfortunately for Defendant, the record offers no support for the notion that he ever asserted his Constitutional rights: In this case, testimony by the interrogating officer established that he advised Defendant of his *Miranda*-rights, made no threats or promises to induce a statement, and that Defendant freely indicated his willingness to waive his rights and make a statement.[9] While Defendant testified differently,[10] nothing in the Law requires a judge to believe one witness over another, merely because he happens to be a defendant — and Defendant himself never claimed he

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[4]*Miranda, supra* at 479.

[5]*See, eg, Edwards v Arizona,* 451 US 477, 101 S Ct 1881, 68 L Ed 2d 378 (1981); *Arizona v Roberson,* 486 US 675, 108 S Ct 2093, 100 L Ed 2d 704 (1988).

[6]*Michigan v Mosley*, 423 US 96, 96 S Ct 321, 46 L Ed 2d 313 (1975); *People v Slocum,* 219 Mich App 695 (1996).

[7]*Oregon v Bradshaw*, 462 US 1039, 103 S Ct 2380, 77 L Ed 2d 405 (1983).

[8]*Michigan v Mosley, supra.*

[9]EH, 5-26.

[10]EH, 27-48.

tried to halt the interrogation, only that the police denied his request for counsel and fabricated his confession.[11] And, in fact, as the testimony supports admitting the statement, it appears that there is no basis for overturning the court's decision: where evidence conflicts, after all, an appellate court must defer to the credibility determinations of the judge who actually heard the witnesses.[12] And where the trial court saw no reason to suppress the statement — and the only evidence supporting a finding of involuntariness is Defendant's claim that he never made the statement in the first place — there is no basis for finding the trial court's determination to be clearly erroneous, and Defendant's contrary claim is without merit.

In addition, while state law provides some support for a contrary approach,[13] and subject to some reasonable limitations,[14] it appears to the People that there is no basis in logic or common sense

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[11]EH, 28-32.

Actually, in his direct examination, Defendant admitted talking to the interrogating officer and telling him "what he wanted to know." (EH, 33). However, on cross-examination, Defendant denied giving the statement at issue — insisting that Officer Edwards made up the written statement, and copied his signature "on a copier or whatever." (EH, 35-48, 42).

[12]MCR 2.613(C).

[13]*See, eg, People v Neal,* 182 Mich App 368 (1990).

[14]If, for example, a defendant claimed that he was too intoxicated to make a statement — or, perhaps, under hypnosis or physical duress at the time — the defense could reasonably claim (a) as he never consciously agreed to its contents, the statement was not his; and (b) whatever he did say was the product of governmental coercion. In such a case, the critical question is not so much the content of the statement, but the circumstances surrounding it — which make the voluntariness of whatever was said the critical point at issue. And, as shown below, this appears to be the central holding of *Lee v Mississippi*, 332 US 742, 68 S Ct 300, 92 L Ed 330 (1948).

By contrast, in this case, the police are saying that the Defendant made a voluntary statement after receiving his *Miranda*-warnings — while Defendant is saying that the police made everything up. Under *these* circumstances, the conflicts in testimony go to the statement's existence — not its voluntariness — and the evidentiary worth of the evidence will depend upon whether the jury believes the police, or the Defendant. It is in these circumstances that the question of standing is presented — since a defendant can have no standing to challenge whether

to permit a defendant to argue in favor of the proposition that a statement he did not make was nevertheless involuntary: it is, after all, difficult enough to prove that a defendant actually made a voluntary statement; proving that a statement the defendant *did not make* was voluntary, however, appears to move beyond merely proving a negative — and into questions of existential philosophy that courts are ill-equipped to decide as a matter of law. Moreover, common sense suggests that there can be no answer to a question which presumes a negative: a court can no more rule on the voluntariness of a statement the Defendant insists he did not make than an astronomer can determine whether a planet which does not exist is larger, or smaller, than Jupiter.

This Court recognized as much in *People v Spivey*:[15] there, the trial court declined to hold an evidentiary hearing when the defendant claimed that the police fabricated portions of his confession. Noting that the purpose of such a hearing was "to prevent prejudice" when a defendant has given "inculpatory statements to the police which are...legally inadmissible due to the coercive circumstances surrounding the confession."[16] However, the Court noted, other facets of any statement by the defendant — including factors "such as credibility, truthfulness and whether the statement had been made at all" — were questions for the factfinder's resolution at trial.[17]

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a statement he never made was, nevertheless, his free and voluntary act.

The People note that a confession is not an affirmative evil to be avoided. Accordingly, there appears to be no reason routinely to permit a defendant to make an alternative argument which says, in essence: "On the other hand, if I'm lying about *that*, then would you believe *this*?" While amusing when offered by Maxwell Smart, there is no reason for a court of law to indulge similar flights of fancy by a criminal defendant.

[15]*People v Spivey*, 109 Mich App 336 (1981).

[16]*People v Spivey, supra* at 37.

[17]*People v Spivey, supra* at 37.

In this case, as in *Spivey*, the critical factual question is not a claim of coercive circumstances surrounding the confession, but rather whether the statement was made in the first place: Defendant himself testified that the signature on his statement was placed there because the police "copied it on a copier or whatever," and the statement at issue was simply not his.[18] By contrast, in the case of *People v Neal*,[19] upon which Defendant relies, the Defendant claimed that the police *coerced his signature on a fabricated confession*, rather than using a copier to forge it — which renders the case factually and legally distinguishable from both this case and *Spivey* — which the Neal court itself noted, in limiting its holding to case where the defendant "claims that he involuntarily signed a statement and that the statement was fabricated by police...."[20]

In this case, Defendant's failure to acknowledge that the statement under review was his should, in any sanely-run system of law, mean that he lacks standing to challenge its admission. Instead, as the critical factual question involves not the circumstances surrounding the statement, but rather the factual question of whether the statement was ever made in the first place, the appropriate resolution would be for the trial court to admit it — with clear instructions to the factfinder that it cannot use the statement against Defendant if it finds the confession to be a police fabrication.[21]

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[18]EH, 42-43.

[19]*People v Neal*, 182 Mich App 368 (1990).

[20]*People v Neal, supra* at 372.

[21]And, in fact, the People would have no objection to a further instruction that the factfinder could take any fabricated evidence offered by either party into account in determining the credibility of other evidence, as well.

Such an approach, it seems to the People, is entirely consistent with the Supreme Court decisions in *Lee v Mississippi*,[22] and *Boles v Stevenson*[23] — albeit, for different reasons.

In *Lee v Mississippi*, the Supreme Court confronted a situation in which the defendant's interrogators testified at trial about oral admissions the defendant made, during the course of the undisputed application of physical abuse — admissions the defendant insisted he never made. The Supreme Court held that the mere fact that the defendant denied the admissions was irrelevant — since whatever came from the process of physical torture was inadmissible, and the relevant question was the abuse, not whether the defendant acknowledged making a statement during the ordeal. The People have no quarrel with either the result or reasoning of this case — for, in large measure, the Law should not hold one accountable for anything said during the course of physical abuse of any kind. One undergoing torture may not, after all, recall everything said to the tormentor — while the inquisitors may record every detail at their leisure, in excruciating detail. And in those circumstances, *whatever* is said is irrelevant — for what is important is not the content of any statement made *in confessio ex delicto*, but the fact that anything said was said under duress. By contrast, in this case, the trial court noted that while the defense was claiming coercion, he was also claiming that the statement offered in court was simply not his — because while his coerced statement was handwritten, the statement offered to the court was typed.[24] Thus, the claim is not that an undocumented oral statement was coerced — but rather, that a written statement was a complete fabrication, thereby bringing the case completely outside the scope of *Lee*. Furthermore, unlike *Lee*

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[22]*Lee v Mississippi, supra.*

[23]*Boles v Stevenson*, 379 US 43, 85 S Ct 174, 13 L Ed 2d 109 (1964).

[24]EH, 27-48.

v Mississippi, the claim of coercion was not only disputed, but largely refuted by the record.[25] Thus, the case is distinguishable on its facts — and this Court is free to adopt a standing rule that is rational, under the circumstances.[26]

On the other hand, the Supreme Court case of *Boles v Stevenson*[27] appears inapposite on its facts: in *Boles*, the trial court admitted the defendant's confession in the absence of a pretrial hearing — overruling an interposed objection to its admission on procedural grounds, and failing to hold a preliminary hearing outside the presence of the jury. Following admission of the evidence, the defendant took the stand and denied making the statement. Thus, the court erred procedurally as a matter of its own state law — thereby precluding the defense from offering an appropriate challenge or developing an adequate record for appellate review,[28] and denying the defendant due process of law by admitting the evidence without troubling to make a ruling as to its admissibility. By contrast, in this case, the trial court *did* conduct an inquiry into the admissibility of the confession — and ruled the confession admissible.

Accordingly, Defendant's first claim of error is without merit.[29]

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[25]EH, 5-26, 51-54.

[26]To the extent that this Court takes a different view of the decision in *Lee v Mississippi* — or, the *Boles* case, discussed below — the People reserve the right to raise the point in the appropriate forum.

[27]*Boles v Stevenson, supra.*

[28]The Michigan analogue to the state court's actions in Boles would be for the trial court to deny a defense motion to suppress a confession without holding a *Walker*-hearing. *Cf, People v Walker,* 374 Mich 331 (1965).

[29]Moreover, even if this Court concludes that the trial court should have ruled on the theoretical voluntariness of a statement Defendant denied making, the appropriate remedy would not be to reverse his conviction: as shown below, a more appropriate resolution would be to

II.

A DEFENDANT IS ENTITLED TO REPRESENTATION BY COMPETENT COUNSEL. HERE, WHILE DEFENDANT DENIED MAKING A STATEMENT OF ANY KIND IN THE FIRST PLACE, THE POLICE TESTIFIED THAT IT WAS VOLUNTARY, AND THERE WAS NO EVIDENCE TO THE CONTRARY. COUNSEL WAS NOT INEFFECTIVE FOR NOT TRYING TO INSIST THAT THE TRIAL COURT RULE ON THE VOLUNTARINESS OF A STATEMENT DEFENDANT CLAIMS HE NEVER MADE.

Standard of Review

Defendant has divided his second claim on appeal into two parts. This Court will find the People's response to the first part — a second challenge to the trial court's decision to admit his confession — in Argument I.

The second portion of his second argument on appeal is that trial counsel was ineffective for failing to "object or argue" that the trial court needed to resolve the voluntariness of the confession Defendant denied making. In considering the question, this Court ordinarily reviews the trial court's factual findings to see if they are clearly erroneous,[30] and its conclusions of law *de novo*.[31] However, Defendant did not seek to establish a record of counsel's rationale, nor call counsel as a witness in

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remand the cause to the trial court to make the factual finding which Defendant insists was lacking.

[30]MCR 2.613(C).

[31]*See, eg, People v Sexton (After Remand),* 461 Mich 746 (2000); *People v DeLisle*, 183 Mich App 713 (1990).

support of his claim. As counsel was a necessary witness in this inquiry,[32] however, Defendant has forfeited the claim, limiting this Court's review to a search of the record for plain error resulting in a manifest injustice.[33]

Discussion

In this case, Defendant insists that the trial court erred in failing to rule on whether a statement he insists was never made was voluntary — and that his attorney was professionally incompetent for failing to insist that the judge decide the point. There are, of course, several problems with these two claims:

In the first place, counsel did raise the issue of involuntariness — and, in fact, argued that very point to the judge.[34] Accordingly, Defendant's claim to the contrary falls on its premise.

Secondly, Defendant can make no showing of the prejudice needed to sustain a finding of ineffective assistance: if the trial court erred in failing to issue a ruling on the theoretical voluntariness of a statement Defendant testified he did not make, the appropriate remedy is a remand for articulation of the court's findings;[35] if the trial court was correct, the decision will stand.[36] In

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[32]*People* v *Mitchell*, 454 Mich 145 (1997).

[33]MCL 76.9.26; MSA 28.1096. *Cf, People* v *Grant*, 445 Mich 535 (1994); *People v Ginther*, 390 Mich 436 (1973); *People v Mitchell, supra.*

[34]EH, 55-57.

Actually, defense counsel consistently argued that the confession was involuntary: "We ask the statement not be admitted and say it's shown involuntary on the issue of coercion," she began — ending a short time later by concluding: "For all these reasons I ask the Court [to] find the statement is involuntary."

[35]*People v Neal, supra; cf, People v Weatherspoon,* 171 Mich App 549 (1988).

[36]*People v Spivey, supra.*

either case, the People fail to discern any prejudice[37] — and Defendant's claim of ineffective assistance must fail.

Beyond this, however, Defendant's entire claim appears to presume that it is counsel, rather than the judge, who decides contested matters, and determines the nature and form of the court's ruling. Since the law appears to be to the contrary, this portion of Defendant's claim is without merit. Simply put, counsel can raise a point of law — but only a court can decide it. And an attorney who demands a ruling before a judge who is under the impression that he has already ruled may be flirting with contempt of court, if too persistent in his demands.[38]

Lastly, while perhaps technically true that a defendant need not admit making a statement to contest its voluntariness, this case is a perfect illustration of the illogic of approaching the legal problem in this manner: simply put, Defendant insists that the statement he did not make was made involuntarily — which, even if not technically a *non sequitur*, is a concept that would bring derision in any venue, outside a court of law. Even so, case law and logic suggest that the trial court's ruling was correct — and that defense counsel was not professionally incompetent for failing to insist that the judge embark on an exercise in existential illogic. Moreover, the record made below refutes Defendant's argument — and mandates this Court's affirmance of the result.

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[37]*Cf, People v Pickens,* 446 Mich 298 (1994); *People v Mitchell, supra.*

[38]*Cf,* MCL 600.1701.

III.

EVIDENCE IS SUFFICIENT IF IT ALLOWS A RATIONAL FACTFINDER TO FIND ALL ELEMENTS OF THE CRIME PROVEN BEYOND A REASONABLE DOUBT. HERE, TESTIMONY—INCLUDING DEFENDANT'S CONFESSION—SHOWED THAT THE VICTIM WAS SHOT TO DEATH DURING THE COURSE OF AN ARMED ROBBERY. TAKEN IN THE LIGHT MOST FAVORABLE TO THE PROSECUTION, THE EVIDENCE WAS SUFFICIENT TO SUSTAIN DEFENDANT'S CONVICTION FOR FELONY MURDER.

Standard of Review

Defendant's third claim of error is that the evidence was insufficient to sustain his conviction for armed robbery and felony murder. In reviewing such a claim, this Court examines the record to determine whether the evidence, considered in the light most favorable to the prosecution, was sufficient to convince a rational factfinder of Defendant's guilt beyond a reasonable doubt.[39]

Discussion

To sustain a defendant's conviction, a reviewing court must find that the evidence introduced at trial, whether direct or circumstantial,[40] when taken in the light most favorable to the prosecution, was sufficient to permit a rational trier of fact to find that the state had proven each element of the crime beyond a reasonable doubt.[41]

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[39] *Jackson v Virginia*, 443 US 307; 99 S Ct 2781; 61 L Ed 2d 560 (1979); *People v Hampton*, 407 Mich 354 (1979).

[40] *People v Fisher*, 193 Mich App 284, 289 (1992); *People v Reddick*, 187 Mich App 547, 551 (1991).

[41] *People v Hampton, supra.*

To convict a defendant of first-degree felony murder, the prosecution must, beyond a reasonable doubt, prove:

- A homicide
- That the homicide was murder; and
- That the murder occurred while the defendant was committing — or trying to commit — one of several "enumerated felonies."[42]

Here, testimony at Defendant's retrial[43] established that the victim died from multiple gunshot wounds,[44] that Defendant and others went to the victim's house in order to rob him, planning on splitting the money between them,[45] and that one of the robbers shot the victim during the course of the robbery — after first ordering the victim to lay on the floor.[46] Taken in the light most favorable to the prosecution,[47] the evidence permits an inference that the victim was murdered "in

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[42]*See, eg, People v Nowack,* 462 Mich 392 (2000); *People v Kelly,* 231 Mich App 627 (1998); *People v Hutner*, 209 Mich App 280 (1995).

[43]Given the jury's inability to reach a verdict on the murder charge in the first trial, the sufficiency of proofs of felony murder at Defendant's initial trial is not before the Court. *People v Mehall,* 454 Mich 1 (1997); *People v Thompson*, 424 Mich 118 (1985); *People v Gonzalez*, 197 Mich App 385 (1992). *See, Richardson v United States*, 468 US 317, 104 S Ct 3081, 82 L Ed 2d 242 (1984).

[44]T, 4/25/01, 79-84.

[45]T, 4/26/01, 35-38.

[46]T, 4/26/01, 36-37. Defendant's statement indicated that one of the robbers ordered the victim to lay on the floor — then shot him as they were leaving.

[47]*People v Hampton, supra.*

perpetration [of a] robbery"[48] in which Defendant was a knowing and willing participant, and his claim to the contrary is without discernible merit.

The People note, with due respect to opposing counsel, that conviction for armed robbery is not an element of first-degree felony murder.[49] Therefore, whether or not the evidence at his retrial would be sufficient to sustain a conviction on *that* charge is irrelevant to a determination of the sufficiency of evidence to sustain his conviction for felony murder.

In addition, Defendant's contrary assumption notwithstanding, the *corpus delicti* of felony murder is a criminal homicide[50] — and the prosecution may use a defendant's statement to establish the degree of homicide,[51] as well as the identify of the people involved,[52] and the defendant's participation as an aider and abettor.[53] Accordingly, it is of no moment that there was "virtually no evidence of an assault" or a "felonious taking of property" without Defendant's testimony and statement to police[54] — and Defendant's third claim of error is without discernible merit.

Moreover, since a conviction for armed robbery conviction is *not* an element of first-degree felony murder, the prosecution need only show that murder committed "in the perpetration or attempt

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[48]MCL 750.316.

[49]Even so, the jury at Defendant's first trial *actually did* convict him of armed robbery.

[50]*See, eg, People v McMahan,* 451 Mich 543 (1996); *People v Williams,* 422 Mich 381 (1985).

[51]*People v Williams, supra; People v Hughey,* 186 Mich App 585 (1990); *People v Watts,* 149 Mich App 502 (1986);

[52]*People v Harris*, 64 Mich App 503 (1975).

[53]*People v Terlisner,* 96 Mich App 423 (1980).

[54]DEFENDANT'S BRIEF, 27-28.

to perpetrate" a robbery, or a "larceny of any kind"[55] — not that the predicate offense resulted in a conviction.[56] But Defendant's conviction for felony murder renders the point moot: since he was properly sentenced only on the murder charge, the sufficiency of evidence to support his armed robbery conviction[57] — which occurred at his first trial — has no bearing on the sufficiency of evidence to sustain the charge for which he is serving a mandatory life sentence.[58]

Lastly, the People note that that robberies are dangerous affairs — and that a defendant who knowingly aids another in committing an armed robbery has set in motion a chain of events likely to culminate in death or great bodily harm.[59] Accordingly, given Defendant's acknowledged participation in the robbery, his claim that he is not responsible for the ensuing murder is without discernible merit.

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[55]MCL 750.316.

[56]*See eg, People v Horton*, 107 Mich App 739 (1981).

[57]In point of fact, as Defendant notes, the evidence at his first trial was largely the same as the evidence at his second — and his conviction for the predicate offense of robbery is supported by testimony of the pursuing police officers, (T, 6/22/00, 45-70, 116-161; 6/26/00, 26-68), the victim's girlfriend, (T, 6/27/00, 16-22), co-defendant Handley's girlfriend, (T, 6/27/00, 27-42), the medical examiner, (T, 6/22/00,75-115), and his own confession. (T, 6/26/00, 179-201).

[58]*People v Mehall, supra; People v Thompson, supra; People v Gonzalez, supra.*

[59]*People v Turner,* 213 Mich App 558, 572-573 (1995).

IV.

A PROSECUTOR IS FREE TO ARGUE ALL REASONABLE INFERENCES FROM THE EVIDENCE, INCLUDING IMPLYING THAT A DEFENDANT IS NOT NICE FOR COMMITTING CRIMES LIKE ROBBERY AND MURDER. IN THIS CASE, DEFENDANT OFFERED NO OBJECTION TO THE PROSECUTOR'S ARGUMENT, WHICH WAS BASED UPON THE EVIDENCE. THE PROSECUTOR'S ARGUMENT DID NOT RESULT IN A MANIFEST INJUSTICE.

Standard of Review

Defendant's final claim of error is that the trial prosecutor denied him a fair trial through professional misconduct during closing argument. As Defendant did not object to the argument, however, he has forfeited the claim on appeal, limiting this Court's consideration of the point to a review of the record for plain error resulting in a manifest injustice.[60]

Discussion

While a prosecutor may not seek to obtain a conviction based upon a jury's fear or sympathy,[61] nor argue facts not in evidence,[62] the prosecutor is free to comment upon the evidence, drawing all reasonable inferences he can muster to convince the jury to convict.[63] This freedom includes, among other things, the right to controvert the defendant's version of event, even to the point of claiming that the defendant is dishonest, or manipulative, or otherwise not favorably

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[60]*See, eg, People v Carines,* 460 Mich 750 (1999); *People v Grant,* 445 Mich 535 (1994).

[61]*People v Leverette,* 112 Mich App 142 (1982).

[62]*People v Tyson*, 423 Mich 357 (1985).

[63]*People v Modelski,* 164 Mich App 337 (1987); *People v Ernest Smith,* 87 Mich App 18 (1978).

disposed toward the truth — or, in other words, that he is a liar.[64] As this Court noted in *People v Cowell*:[65]

> [T]here is no requirement that [the prosecutor] phrase his argument in the blandest of all possible terms. The prosecutor is, after all, an advocate and he has not only the right but the duty to vigorously argue the People's case.

In addition, this Court has long recognized that the prosecutor may properly respond to issues raised by the defense -- even if such an argument might be improper if standing alone.[66] This is because a prosecutor does not operate in a vacuum, and an inability to react to a defendant's posture at trial would give the defense an unfair advantage, permitting a defendant to take unconscionable liberties with our notions of fair practice and procedure, while confining the prosecution to a straightjacket. For the same reason, a reviewing court must consider his remarks within the complete context of the case under review.[67]

In this case, Defendant claims that the prosecutor denied him a fair trial through "deliberate misconduct." Specifically, Defendant challenges on appeal the prosecutor's tactic of pinning him down to his specific claims of inaccuracies by the police, "bolstering" the testimony of prosecution witnesses and dismissing Defendant's testimony as a pack of lies through his argument, and appealing to the jury to convict Defendant as a matter of "civic duty." However, as this Court noted

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[64]*People v Caldwell,* 78 Mich App 690 (1979).

[65]*People v Cowell*, 44 Mich App 623, 628-629 (1973).

[66]*People v Bahoda,* 448 Mich 261 (1995); *People v Jansson,* 116 Mich App 674 (1982).

[67]*People v Cowell, supra* at 627-628

in *People v Goddard*,[68] these are not claims of misconduct, but rather "objections to alleged errors which were not raised at trial." Accordingly, this Court must evaluate them to determine the existence of a miscarriage of justice.[69]

A. The prosecutor did not deny Defendant a fair trial by making an ambiguous reference to someone being "a dope pusher" in a drug-related homicide.

In this case, we see a murder case which involved the robbery of a drug house by rivals — or those lured by the money waiting inside. There was no way for the prosecutor to avoid mentioning drug trade, or its likely relationship to the principals involved in this case. Moreover, viewing the remark Defendant highlights — "He's a dope pusher" — in its proper context, it is clear that the prosecutor was referring not to the Defendant, but to another participant: the phrase "He's a dope pusher" appears to refer to Artemis Stewart not the Defendant[70] — since the prosecutor was arguing that not that the jury should convict Defendant simply because this case involved drugs, but that Defendant would have been expecting the possibility of gunplay, since the victim was a dope dealer, and most dope dealers keep weapons to protect themselves. Of course, given the multiple, ambiguous antecedents[71] we cannot be certain — except for fact that prosecutor's reference was to

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[68]*People v Goddard*, 135 Mich App 128, 138 (1984).

[69]*People v Carines, supra; People v Grant, supra; People v Goddard, supra.*

[70]Compare T, 4/26/01 (Testimony), 56-57, with T, 4/26/01 (Non-Testimony), 22-23: the prosecutor appears to be calling the man who came over "to get $10" as the "dope pusher." That person was Artemis Stewart, and not Defendant.

[71]On the pages cited as "denigrating" Defendant as a drug dealer — T, 4/26/01 (Non-Testimony), 22-23 — we see multiple uses of the word "he" and "him" to refer to Defendant, Artemis Stewart, and the victim.

someone who "came to his house to borrow $10," and the only testimony about anybody wanting to borrow money came from Defendant's testimony that when Artemis Stewart appeared at his (Defendant's) house, he was asking for $10 "for a bag of weed."[72]

Accordingly, considering the remarks in their proper context, the is neither plain error nor a manifest injustice[73] — and this portion of Defendant's claim is without merit.

B. A prosecutor does not deny a defendant a fair trial by arguing that if the jury finds all the elements proven beyond a reasonable doubt, then it is their duty to convict the defendant.

Defendant also claims that the prosecutor denied him a fair trial by urging them to "do your duty" and convict Defendant.

Reviewing the remarks in their proper context,[74] it is clear that the remarks posed no risk of creating anything resembling a "manifest injustice": clearly, the prosecutor was not asking the jury to suspend its independent judgment out of deference; rather, he discussed at length the evidence arrayed against Defendant — that he accompanied his co-actors to the scene intending to rob the victim, or harm him if they did not get what they wanted.[75]

Clearly, the prosecutor was not asking the jury to suspend its critical faculties, simply because he personally was assuring them of the Defendant's guilt.[76] Rather, in his own inartful way, he was

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[72]T, 4/26/01 (Testimony), 56; T, 4/26/01 (Non-Testimony), 22-23.

[73]*People v Carines, supra; People v Grant, supra.*

[74]*People v Cowell*, 44 Mich App 623, 627-628 (1973).

[75]T, 4/26/01 (Non-Testimony), 18-24, 21.

[76]*Compare, People v Hurt,* 211 Mich App 345 (1995).

arguing that if the jury found that he had proven the case beyond a reasonable doubt, it was their duty to return a verdict of guilty — an argument which is not only true, but entirely appropriate. Moreover, the remark was innocuous enough that it passed without notice by the court, or by defense counsel — though it was easily correctable, by a few clarifying words by the court or the prosecutor.[77]

C. Conclusion

Contrary to Defendant's apparent assumption, it is difficult not to "disparage" someone you are trying to send to prison: most reasonable people would not take accusations of being a murderer as a compliment, and would find accusations of criminal conduct to be demeaning and contemptuous. Therefore, the proper question is not whether the prosecutor is "disparaging" the defendant in way that most citizens would find insulting — but rather whether the prosecutor is attempting to cast the defendant as an unworthy or disreputable human being, for reasons unrelated to the case at bar.

Here, every perceived "slight" the prosecutor made — and Defendant now challenges on appeal — was directly related to the facts of the case: after all, allegations of drug dealing pervaded the trial, since the victim was a drug dealer protecting his turf, and his attackers were trying to rob

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[77]For example, had the matter been brought to anyone's attention during trial, the trial prosecutor could have simply said: "Ladies and gentlemen...I apologize if any of you thought that I was trying to convince you to convict the Defendant simply because I'm such a trustworthy person myself. I'm as flawed and prone to mistakes as anyone. I was simply asking you to use your common sense to evaluate the evidence in this case. And if you have a different view of the testimony or witnesses — that's your call. Not mine."

Or, in the event that the prosecutor did not feel inclined to take care of the problem himself, the trial court's remarks could have been blunter: "I instruct you, members of the jury, that the remarks of one attorney — including a prosecutor — are no more trustworthy than another and you should be very careful accepting the word of anyone simply on faith."

him of money and drugs. And the "do your duty" aspect of the argument — while perhaps clumsily phrased — was not an exhortation to convict the Defendant regardless of the evidence, or because of some concern other than the Defendant's guilt. Rather, it was a reminder to the jury of the strengths of the prosecutor's case — and a reminder that if they found all elements of the crime proven beyond a reasonable doubt, it was their duty to convict.[78]

Accordingly, Defendant's fourth claim of error is also without merit.

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[78]*See, eg, People v Bahoda,* 448 Mich 261, 283-285 (1995); *People v Siler*, 171 Mich App 246 (1988); *People v Hedelsky*, 162 Mich App 382 (1987).

RELIEF

WHEREFORE, this Court should deny Defendant leave to appeal.

In the alternative, should this Court consider the point inadequately addressed in the application, this Court may wish to consider granting leave to appeal on the question of Defendant's standing to contest the voluntariness of the statement he claims he never made.

In the alternative, this Court should remand to the trial court for a further articulation of facts.

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JC/lw
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